

OHIO ETHICS COMMISSION

Merom Brachman, *Chair*
Sarah M. Brown, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

September 29, 2004

Informal Opinion 2004-INF-0929

Robert M. Kincaid, Jr.
Baker & Hostetler LLP

Dear Mr. Kincaid:

In a letter received by the Ohio Ethics Commission on September 8, 2004, you requested an advisory opinion regarding the General Manager and Chief Executive Officer (Manager) of the Central Ohio Transit Authority (COTA). Your questions pertain to other public positions held by the General Manager and his business relationship with a financial institution.

Brief Answer

As explained below, under the facts and circumstances described in your request, the Manager of COTA is not prohibited from serving on the Board of Directors of Huntington Bancshares, Inc., a holding company that owns all the stock of Huntington National Bank. In addition, under the facts and circumstances described in your request, the Manager of COTA is not prohibited from continuing to serve as a member of the Ohio Board of Building Appeals and the Board of the Columbus Regional Airport Authority. The Manager is not prohibited from continuing to receive his per diem compensation from the Ohio Board of Building Appeals.

Facts

COTA is a regional transit authority organized pursuant to R.C. Chapter 306. COTA is governed by a Board of Trustees. In addition to other officers, the Board appoints a General Manager/Secretary Treasurer. The person holding this position is not a member of the Board and serves at the pleasure of the Board.

You state that the Manager is a member of the Board of Directors of Huntington Bancshares, Inc., a holding company that owns all the stock of Huntington National Bank (Bank). In the past, the Bank has applied to be the public depository for COTA. The Bank has agreed to withdraw any application with COTA to hold its active and interim deposits and will not seek to serve as a public depository for COTA while the Manager is employed by COTA.

The Manager is a member of the Ohio Board of Building Appeals (OBBA). The Manager is also a member of the Board of the Columbus Regional Airport Authority (CRAA).

Matters Related to Huntington National Bank

Your first question is whether the Ethics Law and related statutes prohibit the Manager from continuing to serve on the board of the Bank's holding company. Because the Manager also serves as the Treasurer of COTA, your question raises issues under both the conflict of interest and public contract provisions of the Ethics Law and related statutes. The Manager of COTA is a "public official," subject to R.C. 2921.42 and 102.03(D) and (E). See R.C. 2921.01(A); R.C. 102.01(B) and (C). See also R.C. 306.31 (a regional transit authority is statutorily defined as a political subdivision of the state) and Ohio Ethics Commission Advisory Opinion No. 89-009.

R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using his position to secure authorization of, a public contract in which the official, a family member, or a business associate has an interest. A deposit of public funds is a public contract, as that term is defined in R.C. 2921.42(G)(1). See Adv. Ops. No. 92-008 and 2004-02. A bank that receives a deposit of public funds would have a definite and direct interest in the depository contract.

For purposes of R.C. 2921.42(A)(1), "business associates" are persons or entities engaged in a common business enterprise to pursue a common goal and achieve a shared objective. Adv. Op. No. 86-002 and 85-004. Because the Manager is a member of the board of the holding company that owns all of the shares of the Bank, both the holding company and the Bank are his business associates for purposes of R.C. 2921.42(A)(1).

Therefore, R.C. 2921.42(A)(1) prohibits the Manager from authorizing the deposit of COTA funds, discussing, recommending, or otherwise using his authority or influence as a COTA officer, formally or informally, to secure the deposit of COTA funds, with the Bank.¹

R.C. 102.03(D) and (E) provide that no public official or employee shall solicit or use his position to secure "anything of value" if the thing of value is of such a character as to have a substantial and improper influence upon him with respect to his duties. The proceeds from a public contract for the deposit of public funds are a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 92-008.

¹ There is an exception to some provisions of the Ethics Law, set forth in R.C. 135.11 of the Uniform Depository Act. However, the exception does not apply to the provisions of R.C. 2921.42(A)(1) and need not be discussed here. See Adv. Op. No. 2004-02.

R.C. 102.03(D) and (E) prohibit a public official or employee from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with his own public agency unless it is determined by his public employer that he is able to withdraw, as a public official or employee, from consideration of matters that affect the interests of the party with which he desires to engage in private outside employment or business activity. Adv. Op. No. 96-004. Under some facts and circumstances, a public official or employee who desires to engage in private outside employment or business activity may face an irreconcilable conflict of interest between his public duties and his private financial interests that prevents him from engaging in a specific type of private outside employment or business activity. Adv. Op. No. 92-009.

The "treasurer" of a political subdivision is statutorily required to perform duties set forth in R.C. 135.31 to 135.40 of the Revised Code governing the deposits of the political subdivision's funds. Adv. Ops. No. 92-008 and 2004-02. These duties are mandatory, and the treasurer cannot withdraw from performing them. Further, the treasurer cannot avoid a conflict by delegating his statutorily mandated authority to another public official or employee who is a subordinate. Therefore, the Manager is unable to withdraw from performance of his statutorily mandated duties, as Treasurer of the transit authority, that involve the deposits of the authority.

The combined restrictions in R.C. 2921.42(A)(1) and R.C. 102.03(D) and (E) effectively prevent a person who serves as treasurer of a political subdivision from being an employee or officer of a public depository of the political subdivision's funds. *Id.* However, in this instance, the Bank is not currently a public depository for COTA and has indicated that it would not pursue deposits from COTA while the board member of the Bank's holding company serves as Manager of COTA. The Bank's decision to forego pursuing deposits from COTA negates the irreconcilable conflict of interest that would otherwise arise in the instant situation. Under these circumstances, R.C. 102.03(D) and (E) and 2921.42(A)(1) do not prohibit the Manager from being a member of the board of the Bank's holding company during his service as the Manager. If the Bank alters its decision during the Manager's COTA service, the Ethics Law may impose limits on the Manager. At that time, the Manager should seek additional guidance from the Commission.

Simultaneous Service With Other Public Agencies

The Manager is a member of OBBA and CRAA. You state that there is no interaction, and no contractual, regulatory, or other relationship, between COTA and OBBA and CRAA. You also state that the Manager is paid a fixed per diem for his service on OBBA.

Whenever the same public official or employee desires to occupy multiple public positions, the question arises whether the positions are "compatible"—that is, whether a person may simultaneously hold the public positions. Seven criteria, which the Ethics Commission has no authority to interpret, are used to determine "compatibility." See 1979 Att'y Gen. Op. No. 79-111. An interpretation of the restrictions imposed by the Ethics Law, Chapter 102., and related statutes, Sections 2921.42 and 2921.43 of the Revised Code, is not the same as a

determination of compatibility. Adv. Op. No. 91-002. See also 1990 Att'y Gen. Op. No. 90-037. In order to obtain a compatibility determination, you may wish to speak to the legal advisors for the other public agencies involved.

Even if two positions are "compatible," the Ohio Ethics Law and related statutes may restrict the official's or employee's actions in one or both of the public positions. Adv. Op. No. 91-006. These restrictions may impose such limitations upon the public official or employee that the official or employee is precluded from serving in both positions despite the fact that the positions have been determined to be compatible.

Public Contract Law—R.C. 2921.42(A)

As explained above, the public contract restriction of R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using his authority or influence, to secure a public contract in which he, his family members, or his business associates have an interest. In addition, R.C. 2921.42(A)(4) prohibits a public official from having a definite and direct pecuniary or fiduciary interest in a public contract even if he has not participated in the award of the public contract. Adv. Op. No. 81-008.

Thus, if a contract exists between COTA and either OBBA or CRAA, then the prohibitions of R.C. 2921.42 would be implicated. The existence of a contractual relationship may, in some instances, preclude an individual from serving more than one public agency. R.C. 2921.42 also provides exceptions from the prohibition against a public official having an interest in a contract with his own political subdivision or governmental agency. You have stated that there is no contractual relationship between COTA and either OBBA or CRAA.

Conflict of Interest Laws—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) prohibit a public official or employee who serves in multiple public positions from using his authority or influence in one position to benefit either himself or the interests he serves in his other capacities. See, generally, Adv. Op. No. 91-006 (addressing the restrictions imposed upon a member of city council who is employed by a school district that includes the city that he serves as a member of council).

Thus, if matters involving OBBA or CRAA should come before COTA, then the Manager would be prohibited from participating in those matters. If matters involving COTA come before OBBA or CRAA, then the Manager would be prohibited from participating in those matters. You have stated that there is no interaction, and no regulatory or other contractual relationship, between COTA and either OBBA or CRAA. In the absence of any interaction, regulatory, or other relationship between COTA and OBBA, the per diem compensation the Manager receives from OBBA would not be a thing of value that could have a substantial and improper influence upon him with respect to his public duties for COTA. If regulatory or other relationships between COTA and either OBBA or CRAA are discovered or proposed, then our Office should be contacted for further guidance.

Revolving Door Law—R.C. 102.03(A)

R.C. 102.03(A), the “Revolving Door Restriction” of the Ethics Law, prohibits a public official or employee from representing a client, employer, or any person before any public agency on any matter in which he has personally participated as a public official or employee. R.C. 102.03(A) would, therefore, prohibit the Manager from representing one public agency, before either of the other public agencies he serves, on any matters in which he personally participated as a public official or employee. See, generally, Adv. Op. No. 82-002. Because there are no regulatory relationships between COTA and OBBA or CRAA, it is unlikely that this restriction will be implicated. However, should issues of this nature arise, the restrictions in the Ethics Law would apply to the Manager, who should contact the Commission for further guidance.

Representation—R.C. 102.04(A)

R.C. 102.04(A) prohibits a state official who serves a political subdivision from receiving, directly or indirectly, compensation from the political subdivision for any service rendered personally in any matter that is before any department, division, institution, instrumentality, board, commission, or bureau of the state. As a member of OBBA, the Manager is a state official. As such, he is prohibited from receiving compensation from any party, including COTA, to represent COTA before any state agency, including OBBA, the General Assembly, the Attorney General’s office, and other entities of the state.

R.C. 102.04(D) provides an exception to the prohibition of Division (A). A non-elected state official is exempted from Division (A) if both of the following apply: (1) the agency before which the matter that involves the rendering of services is pending, is an agency other than the one with which he serves; and (2) prior to rendering the personal services, the employee files the withdrawal statement described in R.C. 102.04(D). The statement must be filed with: (1) the Ethics Commission; (2) the state agency with which he serves (OBBA); and (3) the public agency before which the matter is pending.

If COTA asks or expects the Manager to represent its interests before any entity of the state, as described above, including the General Assembly and all state departments, then the provisions of R.C. 102.04(A) will be implicated and the Commission should be contacted for further guidance about the exception set forth in R.C. 102.04(D). Because the Manager is absolutely prohibited from representing COTA before OBBA, the per diem compensation he receives from OBBA would not be prohibited compensation for purposes of R.C. 102.04(A).

An opinion that further explains the provisions of R.C. 102.04(A), and a copy of the statement required by R.C. 102.04(D), are attached to this opinion.

Robert M. Kincaid, Jr.
September 29, 2004
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Conclusion

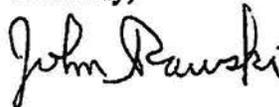
As explained above, under the facts and circumstances described in your request, the Manager of COTA is not prohibited from serving on the Board of Directors of Huntington Bancshares, Inc., a holding company that owns all the stock of Huntington National Bank. In addition, under the facts and circumstances described in your request, the Manager of COTA is not prohibited from continuing to serve as a member of the Ohio Board of Building Appeals and the Board of the Columbus Regional Airport Authority. The Manager is not prohibited from continuing to receive his per diem compensation from the Ohio Board of Building Appeals.

The conclusions of this opinion are wholly based on the facts you have provided. If, in the future, contractual, regulatory, or other relationships between COTA and Huntington National Bank, OBBA, or CRAA arise or are discovered, the provisions of the Ethics Law may be implicated. In that instance, the Manager is encouraged to contact the Commission for further guidance.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 24, 2004. The Commission commends COTA and its new General Manager for requesting guidance before taking any actions that could be prohibited by law.

The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



John Rawski
Staff Attorney

Enclosures: Advisory Opinion No. 93-010
R.C. 102.04(D) statement